SUPREME COURT
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

EILEEN LASHER,
Petitioner
v.
DANIEL LASHER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a parent who is deprived of all custody of and contact with her minor children as a result of a state court child custody proceeding entitled to a full evidentiary trial under the due process clause of the Fourteenth Amendment, at which trial the factual and legal grounds justifying such deprivation must be proved?

LIST OF PARTIES & CORPORATE DISCLOSURE

Daniel Lasher is the Respondent. Marcia Orenstein is the minors' counsel appointed by the state court. No parent or subsidiary companies exist as contemplated by Rule 29.6.

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CITATIONS BELOW

Lasher v. San Diego Country Superior Court, Supreme Court of California, Case No. S121223. Petition for Review denied. 2004 Cal.LEXIS 1543 (February 18, 2004). Unreported. [Appendix, p.].

Lasher v. San Diego County Superior Court, California Court of Appeals, 4th District, Case No. D043284. Petition for Writ of Mandate denied on December 8, 2003. Unreported [Appendix, p.].

STATEMENT OF JURISDICTION

On February 18, 2004, The Supreme Court of California (Case No. S121223) denied Petitioner's Petition for Review filed on December 16, 2003, to contest the California Court of Appeal (4th District) December 8, 2003, decision denying Petitioner's Petition for Writ of Mandate (Case No. D043284) filed on November 21, 2003, *sub nom Lasher v. San Diego County Superior Court*. 2004 LEXIS 1543. No rehearing was sought.

Accordingly, this Court has certiorari jurisdiction under 28 U.S.C. § 1257 (a).

RELEVANT CONSTITUTIONAL PROVISIONS

Amendment XIV, Sec. 1, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Eileen Lasher is the mother of two children. D.L., a 14 year old male, and N.L., a 13 year old female. The children's father is Respondent Daniel Lasher. The parties were divorced in December, 2001, in the Superior Court for San Diego County, California (Case No. D-401350). Petitioner, who had already obtained a domestic violence restraining order against Mr. Lasher, was awarded primary custody of both children from the time of the separation in May, 1995, until December, 1997. After a hearing in December, 1997, the parties were granted joint custody, with Mr. Lasher named

primary custodian of both children[1]. Petitioner was allowed visitation with both children three weekends per month, and every other Wednesday evening. D.L. was choked and battered by Mr. Lasher on April 17, 1998. Petitioner filed a motion to seek custody as a result of the attack of D.L.. The Superior Court sent the parties to mediation, and the court eventually declined to change custody and instead allowed Ms. Lasher two additional weeks of interrupted time with the children each summer.

On March 31, 2000, N.L., then 9 years old, reported to her teacher that Mr. Lasher's girlfriend choked her. In response, Ms. Lasher filed another motion in the Superior Court to remove the children from Mr. Lasher's custody. The presiding state court judge, Hon. Edward Huntington, ordered the child's physician, who had examined N.L. and documented the abuse, to leave the courtroom and refused to allow her to testify. Instead, Marcia Orenstein, the attorney appointed to "represent" the children under Cal. Fam. Code § 3150, argued to Judge Huntington that Ms. Lasher was "emotionally abusing" the children by bringing the case to court again. Without allowing the physician to testify, and after only listening to Ms.

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1. Ms. Lasher was branded with the bogus and discredited diagnosis of "parental alienation syndrome." This label is typically placed on mothers attempting to protect their children from abusive fathers. See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 Family L. Quarterly 527 (Fall 2001).

Orenstein's position, Judge Huntington gave Mr. Lasher sole legal and physical custody of the children on July 20, 2000. Ms. Lasher was again allowed visitation every other weekend, but she was prohibited from taking the children to any doctors.

On August 8, 2000, only nineteen days after Ms. Lahser lost custody to Mr. Lahser, an 11 year old male neighbor child orally copulated Mr. Lasher's girlfriend's seven year old son, while Mr. Lasher was caring for the victim child. N.L. walked in during the episode, and ran outside to alert her brother and others. On August 21, 2000, Ms. Orenstein, in response to the incident, moved D.L. back to Ms. Lasher's home without first obtaining a court order, but after she sent a proposed stipulation for the change. Ms. Orenstein, with no apparent authority to do so, "ordered" that no one discuss the attack with the children. She also "ordered" that the two Lasher children could never be together at any time.

D.L. thereafter remained in Ms. Lasher care in her home, with the knowledge and consent of both Mr. Lasher and Ms. Orenstein, from August 14, 2000, until May 7, 2003. She has been prohibited by the Superior Court from having any contact whatsoever since May 7, 2003. Without any evidentiary hearing having been held, and only upon Mr. Lasher request that D.L. be returned to him, Judge Huntington issued an order on May 6, 2003, returning D.L. to his father's home. Since that date, Ms. Lasher has not been allowed contact with D.L. and her demand for an evidentiary hearing to justify factually and legally the curtailing of Ms. Lasher's parental rights have been refused, as further explained below.

As set forth above, Ms. Lasher was exercising weekend visitations with N.L., her daughter. On November 23, 2001, Ms. Lasher picked up N.L., the 10 years old, for her regular visitation. The next day, when N.L. donned a tank top, Ms. Lasher noticed a purple mark just above the child's left nipple. When her mother inquired about the mark, N.L. quickly ran and locked herself in her room. After N.L. left her room, she still refused to discuss the injury. Ms. Lahser immediately took N.L. to Children's Hospital in San Diego. There, the child refused again to explain the lesion, and, upon further examination, the physicians discovered a second mark just above her right nipple. The doctors then wrote on her chart that the "suction type injuries" were three to four days old, clearly placing their occurrence while she was in Mr. Lasher's care. A sheriff's deputy, summoned by the hospital physicians, later arrived and interviewed N.L. During the interview, N.L. revealed that her father had sucked on her breasts and caused the injuries.

Before Ms. Lasher and her daughter left the hospital that afternoon, the sheriff's deputy informed them that D.L. would be returned to Ms. Lasher's home and that N.L. would be allowed to remain in Ms. Lasher's protective care. However, D.L. was not returned as promised. Later that evening, the county child protection agency directed Ms. Lasher to return N.L. to Mr. Lasher's girlfriend- the one whom N.L. reported for choking her earlier. Ms. Lasher refused to put her child in such danger. On November 29, 2001, N.L. the San Diego County Sheriff's Office conducted a videotaped interview with N.L.,

wherein she gave explicit details of her father's pulling up her shirt and sucking her breasts.

On November 26, 2001, in response to N.L.'s reports and the convincing medical evidence of her abuse, Ms. Lasher filed a motion to change custody. On November 27, Judge Huntington dismissed the emergency *ex parte* motion. On December 1, 2001, Ms. Lasher saw N.L. for the last time. On December 11, 2001, the court again took up Ms. Lasher's motion for change of custody, Ms. Orenstein argued that N.L. herself caused the injuries- a preposterous claim. Judge Huntington referred to the bruises on N.L.'s breasts as a "blemish." At the conclusion of the hearing, at which no evidence was presented, Ms. Lasher was allowed only supervised visitation with N.L., was ordered to undergo a psychological evaluation. D.L. remained in Ms. Lasher's custody.

Shortly after the December 11 hearing, Ms. Lasher obtained a psychological evaluation from Dr. Brefni Barrett, a forensic examiner frequently used by the court there. Dr. Barrett concluded that Ms. Lasher posed no danger to her children, and otherwise gave her a clean bill of health. In an inexplicable response to Dr. Barrett's report, Ms. Orenstein[2]

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2. Ms. Orenstein's conduct here represents the type of troubling behavior often seen in attorneys who are supposed to represent the interest of children in custody cases. See Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 Loyola J. of Pub. Int. L. 106 (2002). Recently, the American Bar Association adopted standards for

obtained an *ex parte* order from Judge Huntington, supported by no evidence, and without any sort of evidentiary hearing, terminating all contact between Ms. Lasher and N.L. On May 3, 2003, an ex parte order was entered by Judge Huntington awarding Mr. Lasher custody of the children.

Thus, Ms. Lasher remains barred from all custody, contact, and visitation with her minor children. No evidentiary hearing has ever been held regarding any allegations purportedly justifying such a deprivation of her parental rights.

Incidentally, Ms. Lasher filed a federal declaratory judgment action against the Superior Court, Judge Huntington, and Ms. Orenstein in the U.S. District Court for the Northern District of California (Case No. 02-CV-2142) on October 30, 2002, seeking a federal judicial recognition of her due process rights in the state court case. On March 19, 2003, the complaint was dismissed for want of jurisdiction and judicial immunity. The decision is unreported. An appeal was filed, but abandoned.

Ms. Lasher has urged her federal due process rights in the state court proceedings below as follows:

1) At a hearing before Judge Huntington on June 5,

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such attorneys which essentially eliminate the role played by Ms. Orenstein, who simply advances her own opinions, and not those of her child clients, and who undermines the proper fact finding role of the judge. See ABA, *Standards of Practice for Attorneys Representing Children in Custody Cases*, 37 Family L. Quarterly 105 (Summer, 2003).

2002, the following dialogue occurred between the court and William Blatchley, Esq., Ms. Lasher's counsel:

> Blatchley: We have submitted an at issue, asked for an eight day trial. This case on the custody– well, of course, we have years of child protective services, witnesses and doctors.
>
> Court: Who is paying for all this?
>
> * * *
>
> Court: Good grief. I mean I don't care what the issues are. Who is paying for an eight day trial with three lawyers and a judge?
>
> Blatchley: Well, we haven't gotten to that yet, but this case needs testimony. It needs to have social services workers stop testifying through third parties and it needs to have this court hear some evidence. And the same with this motion.
>
> Court: What would that be?
>
> Blatchley: Whenev[illegible] the court can find us some time.
>
> Court: No. I mean what evidence would that be?
>
> Blatchley: What evidence would that be? It would be the physical evidence, evidence of handprint, bruises on the rearend that are described as purple and officers have videos. It's videos of suck marks on child's breasts [illegible]at–

Court: What good does that do without interpretation? I'm not going to interpret that kind of stuff.

Blatchley: I have expert witnesses prepared to come in and testify, Judge. This is a serious case...it needs to have an evidentiary process.

* * *

Court: This takes me back to my original question. Who's got the money for the kind of experts and time that you are talking about? Is your client paying for this? Is she paying you?

Blatchley: My client's family is funding what they perceive as child abuse and a need to have some due process and have a trial with evidence instead of hearsay statements by minor's counsel, [Mr. Lasher's attorney] and other people.

Court: Minor's counsel is acting well within her statutory purview. She is allowed to do that...

Blatchley: But, judge, this information needs to be accurate and that's the issue that we'll–

Court: That's a matter of perception, I guess.

* * *

Blatchley: I'm talking about a trial.

There's never been a trial on custody/visitation, on any of these abuses, there's never been a minutes testimony taken in any of this, and this is not a post-judgment case. Counsel can't cite to me any judgment that has ever been rendered that has bifurcated and concluded custody and visitation such that–

Court: If the issues went up on appeal, that would certainly seem to resolve it, wouldn't it?

* * *

Court: What else do you want? You just want open season on everything?

Blatchley: Not open season.

Court: Whatever you want to call it I don't care. You want open season on everything?

Blatchley: No. We want our day in court.

* * *

Blatchley: Judge, we haven't had an evidentiary trial to hear the girl's allegation. You made a pendente order placing the child with the father and terminating my client's access to the child.

Court: Okay. So what are you talking–what do you want?

Blatchley: I want a trial.

Court: That will come up in due course, I guess.

Blatchley: In the meantime, any proceeding–... we are going to want to cross-examine the declarants. We are going to want to cross examine witnesses. We want to call witnesses.

Court: This is only having to do with the boy is their motion.

Blatchley: But I'm going to file a motion on both of the children.

Court: Well, file anyway. I can't stop you.

Blatchley: But I don't want to litigate the pendente lite.

Court: That's tough.

Blatchley: I want a trial.

Court: That's tough. You get to file your request for trial date, and we'll deal with it...

Blatchley: I want the right to take testimony. So my time estimate on [Mr. Lasher's] motion is a two day time estimate.

Court: Come on. For what? On their motion?

* * *

Court: If I determine that there needs to be a trial, we'll go from there. ..

* * *

Blatchley: I wish to cross-examine the family court services case worker if the court is

going to consider that.

Court: Sure. What the heck...

[Lower court transcript, June 5, 2002, pp. 3-15]

2) At another hearing before Judge Huntington on September 25, 2003, the following exchange took place between the court and Patrick DeCarolis, Esq., Ms. Lasher's new counsel:

> Court: ...The ex-parte papers just indicate that wife set a 12 day trial. As far as I know, there's no 12 day trial set because there's no judge that has set one. I have a request , I guess, filed by your office indicating the trial will take 12 days. I'm not sure what that's all about...
>
> DeCarolis: Well, your honor, as best as I can determine from the review of the file–and I'm sure you know it's quite extensive–the custody matters have never gone to trial. While there have been a number of hearings, there has never been a trial, per se, and that is what–
>
> Court: Mr. DeCarolis, I'll cut you short on that. Mr. Blatchley took us down that path and that's not going to fly. Judge Cannon made a decision on this case long, long ago, many years ago and there is going to be no new trial on the issue of custody...
>
> * * *

DeCarolis: On the issue of the trial on custody, is that the court's position that a trial has already taken place?

Court: It is that position, yes.

* * *

Court: Custody was long ago decided and a second round of the custody decisions was made last summer. There is nothing left on that...

DeCarolis: ...It's a very extensive file–It doesn't reflect a trial has ever taken place. And she is asserting her right to a trial, and I think you know a litigant does have a right to trial. But did the trial take place before your honor?

Court: No, it did not. It took place before Judge Cannon who was my predecessor in this department...but I've gone through the file pretty extensively myself, and I'm absolutely persuaded that Judge Cannon made a permanent decision, and what we've been doing since this is tinkering with modifications to it. The decision I made last–whatever period it was– last year was a very definitive modification after extensive review.

* * *

Court: I'm not doing anything. I'm–I show up for work every day and people bring ex-parte matters in. I see in here a 12 day

request for a trial that's not going to be granted. I'm not making any orders on it. It just simply isn't going to happen.

* * *

DeCarolis: Thank you. Lastly, your honor, my client does–you know, she does want to have a trial on the case. I think I made that clear. But for the record she wants to have a trial. She doesn't believe that a trial has taken place, that her due process rights have been adversely affected.

Court: I think she's had more due process than any 20 people combined down at this courthouse to be honest. I just got back yesterday a note that her appeal in federal court was rejected so I think she's getting her due process. I'm not worried about her lack of due process. She's had more hearings than you can shake a stick at.

[Lower court transcript, September 25, 2003, pp. 1-8]

4) The due process issue was presented to the California Court of Appeal (4th District) in Ms. Lasher's Petition for Writ of Mandate filed on November 21, 2003, and denied on December 8, 2003[Case No.D043284]:

Thus, unless this Court of Appeal grants the within petition, no trial on the issue of custody

will take place, Eileen will be denied her rights to a full custodial proceeding including cross examination of witnesses and custody evaluators, and no judgement on the issue of custody will ever be entered. Eileen is suffering a continuing denial of her right of due process and her right to a final determination of the issues before the trial court [Petition for Writ of Mandate, p.9].

5) The due process issue was presented to the Supreme Court of California in Ms. Lasher's Petition for Review filed on December 16, 2003, and denied on February 18, 2004[Case No. S121223]:

> The fact that a party has participated in a pendente custody proceeding (or even many pendente custody proceedings) does not satisfy a party's procedural or constitutional rights to due process, which are guaranteed of the Fourteenth Amendment to the United States Constitution and Article 1, § 7 of the California Constitution. A litigant in any proceeding has a right to a trial which finally resolves the issues between the parties and which results in a final judgment. This is even more so in the case of custody, in which fundamental constitutional rights relating to the parent-child relationship

> are involved. See, e.g., Troxel v. Granville (2000) 530 U.S. 57 [Petition for Review, p. 11].
>
> In the case at bar, Eileen [Lasher], who is being denied contact with her children, has been denied a full evidentiary hearing, with live testimony and a right of cross examination, for determining her custodial rights. This constitutes a denial of her due process rights [Petition for Review, p. 21].

Thus, the egregious refusal of the lower court to grant Ms. Lasher a trial on the custody and visitation issues is properly before this Court. The attitude of the Superior Court judge, as clearly indicated by the transcripts, and Ms. Lasher's resulting loss of all contact with her two children, make a compelling case for this Court's grant of certiorari.

ARGUMENT

A writ of certiorari is appropriate here under Rule X(b) and (c), as the Supreme Court of California has decided an important question of federal law regarding due process rights of parents losing custody of their children in a way conflicting with relevant decisions of the federal appellate courts and of this Court. This Court has repeatedly held that parents have a fundamental constitutionally protected right to the companionship, care, and custody of their minor children, which cannot be denied absent due process of law. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975); *Quilloin v. Walcott*, 434 U.S. 246, *reh. den.*, 435 U.S. 918 (1978); *Santosky v. Kramer*, 455 U.S. 745 (1982); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Troxel v. Granville*, 530 U.S. 57 (2000). An essential component of the Fourteenth Amendment's due process clause is the right to a meaningful opportunity to be heard prior to permanent deprivation of a fundamental right. *Postal Telegraph Cable Co., v. Cuty of Newport, Ky.*, 247 U.S. 464 (1918); *Anderson v. National Bank of Luckett*, 321 U.S. 233 (1944); *Covey v. Town of Summers*, 351 U.S. 141 (1956); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1998). The due process right to a trial before the long term removal of parental custody has been consistently recognized by the federal courts. *Stanley,*

supra; *Santosky, supra*; *Troxel, supra*; *Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003); *Hatch v. Department for Children, Youth, and Their Families*, 274 F.3d 12 (1st Cir. 2001); *Morrell v. Mock*, 270 F.3d 1090 (7th Cir. 2001); *Campbell v. Burt*, 141 F.3d 927 (9th Cir. 1998).

California courts have recognized parents' rights to a meaningful hearing in custody deprivation cases, but have avoided doing so on federal constitutional grounds. See e.g, *In re Jesusa V.*, 32 Cal. 4th 588, 85 P.3d 2 (Cal. 2004); *In re J.W.*, 29 Cal.4th 200 (Cal.2002); *In re Catherine H.*, 102 Cal.App.4th 1284, 126 Cal.Rptr. 2d 342 (4th Dist.2001); *Tracy A. v. Superior Court of Los Angeles County*, 117 Cal.App.4th 1309 (2d Dist.2004). In fact, it appears that California courts are very reluctant to insist on the strict implementation of acknowledged due process rights in family court proceedings, for fear of further burdening a strained court system. See *Lammers v. Superior Court*, 83 Cal.App.4th 1309, 100 Cal. Rptr.2d 455 (4th Dist. 2000), involving the same San Diego County Superior Court.

In a California case scenario similar to this Petitioner's instant case, a mother, who lost custody and contact with her child based on unsubstantiated assertions of the minor's counsel, was denied a full evidentiary hearing on the allegations made against her. Her case, however, involved a juvenile court dependency action brought by the county child protection agency instead of a regular family court custody case between two parents, as exists here. The appellate court, while mentioning the federal due process rights, ordered the full

hearing based on a statutory right. *In Re Josiah S v. Diana S.*, 102 Cal.App. 4th 403, 125 Cal. Rptr.2d 413 (2d Dist.2002).

Petitioner has, therefore, been denied her due process rights guaranteed under the Fourteenth Amendment to the United States Constitution to a full evidentiary hearing on the alleged legal and factual justification for the denial of custody of and visitation and contact with her two children. This Court remains her last hope for vindication of her rights and for a fair and just adjudication of the best interests of her children.

Accordingly, Petitioner prays that this Honorable Court grant a writ of certiorari to the Supreme Court of California, reverse that court's February 18, 2004, decision, and instead order that the Superior Court for the County of San Diego forthwith grant Petitioner a full evidentiary trial on the issues of her children's custody and visitation.

Respectfully submitted,

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APPENDIX

COURT OF APPEAL-FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

EILEEN LASHER,
Petitioner

D04324
(San Diego County Super.Ct.No. D401350)

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;
DANIEL LASHER,
Real party In Interest
_____/

Filed DEC 8 2003

THE COURT:

The petition for writ of mandate has ben read and considered by Justices Nares, McIntyre and Aaron. The petition is denied.

McINTYRE, Acting P.J.

SUPREME COURT OF CALIFORNIA
NO. S121223

EILEEN THEOFANOUS LASHER,
Petitioner
v.
SAN DIEGO COUNTY SUPERIOR COURT,
Respondent;
DANIEL LASHER,
Real Party in Interest

PRIOR HISTORY: Fourth Appellate District, Division One,
No.D043284

OPINION: Petition for Review denied.

February 18, 2004